IN THE SUPREME COURT OF MISSOURI

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| ERNEST BLAND, | ) | |
| | ) | |
| RESPONDENT, | ) | |
| | ) | |
| vs. | ) | Appeal No. SC83939 |
| | ) | |
| IMCO RECYCLING, INC., AND METAL MARK, INC., | ) | |
| | ) | |
| | ) | |
| APPELLANTS. | ) | |

Appeal from the Circuit Court of Scott County
State of Missouri

The Honorable David A. Dolan
Circuit Judge

# BRIEF OF APPELLANTS IMCO RECYCLING, INC. AND METAL MARK, INC.

ON TRANSFER FROM THE SOUTHERN DISTRICT
OF THE MISSOURI COURT OF APPEALS

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## JURISDICTIONAL STATEMENT

This appeal arises out of a personal injury action brought by Plaintiff Ernest Bland against IMCO Recycling, Inc., and Metal Mark, Inc., in the Circuit Court of Scott County. (L.F. 10-11.) On February 25, 2000, the jury returned a verdict in Plaintiff's favor for $4 million. (L.F. 96.) On March 13, 2000, the trial court entered judgment on the jury's verdict. (L.F. 98.)

On April 12, 2000, IMCO Recycling filed its Second Amended Motion for Dismissal for Lack of Personal Jurisdiction or Subject Matter Jurisdiction, for Judgment in Accordance with its Motion for Directed Verdict at the Close of Plaintiff's Evidence and its Motion for Directed Verdict at the Close of All Evidence or in the Alternative, for a New Trial on All Issues, etc. (L.F. 138.) On April 12, 2000, Metal Mark also filed its Amended Motion for Dismissal for Lack of Personal Jurisdiction or Subject Matter Jurisdiction, for Judgment in Accordance with its Motion for Directed Verdict at the Close of Plaintiff's Evidence and its Motion for Directed Verdict at the Close of All Evidence or in the Alternative, for a New Trial on All Issues, etc. (L.F. 100.) The trial court denied these motions on May 24, 2000. (L.F. 178.)

This appeal followed when, on June 2, 2000, IMCO Recycling and Metal Mark filed their Notice of Appeal to the Southern District of the Missouri Court of Appeals. (L.F. 180.) On August 6, 2001, the Missouri Court of Appeals affirmed the trial court's judgment.

Following this decision, IMCO Recycling and Metal Mark filed a Motion for Rehearing and Alternative Application for Transfer on August 21, 2001. The Court of Appeals denied these requests for post-opinion review on August 28, 2001. Thereafter, IMCO Recycling and Metal Mark filed an Application for Transfer in the Supreme Court of Missouri on September 11, 2001. On October 23, 2001, the Court sustained their Application; therefore, the Court has jurisdiction over this matter under Article V, Section 10 of the Missouri Constitution and Rule 83.03 of the Missouri Rules of Civil Procedure.

## STATEMENT OF FACTS

### A. Introduction

Ernest Bland filed this action against Pittsburgh Aluminum Processing, Inc., IMCO Recycling, Inc., Marnor Aluminum Processing, Inc., Metal Mark, Inc., and Max Sweet for personal injuries he sustained on January 12, 1997, when molten aluminum splashed onto him from a rotary furnace at the Marnor aluminum processing plant where he was employed. (L.F. 1-20; Ex. DD.) The Marnor plant is located in Sikeston, Missouri. (T. 273.)

The furnace came from Pittsburgh's plant in Pittsburgh, Kansas. (T. 273, 377; Ex. G.) Marnor and Pittsburgh were Metal Mark's wholly owned subsidiaries. (T. 181, 279; Ex. C; A3.) At the time of the accident, Metal Mark owned the Marnor plant and was Plaintiff's employer. (Exs. D, E, and Y; T. 271, 304-305; A8-10.) IMCO Recycling was Metal Mark's ultimate parent corporation. (Ex. C; A3.) Max Sweet was Plaintiff's co-worker at the Marnor plant. (T. 98.)

Plaintiff alleged Pittsburgh was: (1) strictly liable for designing a defective furnace; (2) liable for the negligent design of the furnace; and (3) liable for supplying a dangerous instrumentality. (L.F. 35-39.)

Plaintiff alleged IMCO Recycling was: (1) strictly liable for putting a defective furnace into the stream of commerce; and (2) liable for negligently supplying a dangerous instrumentality. (L.F. 40-49.)

Plaintiff alleged Metal Mark was: (1) strictly liable for putting a defective furnace into the stream of commerce; (2) liable for negligently designing or

manufacturing the furnace; (3) liable for negligently supplying a dangerous instrumentality; and (4) liable for negligently failing to train the furnace operators. (L.F. 49-56.)

Plaintiff alleged Marnor was: (1) liable under a theory of premises liability; (2) liable for negligently supplying a dangerous instrumentality; and (3) liable for negligently failing to train the furnace operators. (L.F. 56-62.)

Plaintiff alleged Max Sweet was negligent in operating the furnace. (L.F. 62-63.) IMCO Recycling, Pittsburgh, Marnor, and Metal Mark also cross-claimed against Max Sweet. (L.F. 73-74.)

In response to Plaintiff's action, IMCO Recycling, Pittsburgh, Marnor, and Metal Mark moved for dismissal on the grounds of lack of subject matter jurisdiction and lack of personal jurisdiction. (L.F. 31.) Their motion was not ruled upon before trial. (T. 353-372.) The same grounds for dismissal were pleaded in their answer as affirmative defenses. (L.F. 66).

Before trial, Plaintiff dismissed his strict liability counts against Pittsburgh, Metal Mark, and IMCO Recycling as well as all of his claims against Marnor. (T. 16, 17.) During trial, both Plaintiff's claim and Defendants' cross-claim against Max Sweet were dismissed. (T. 324, 389.) Also, during trial, Plaintiff dismissed his remaining claims against Pittsburgh. (T. 321.)

IMCO Recycling and Metal Mark remained the only defendants at the case's conclusion. Plaintiff submitted his case against IMCO Recycling on a theory that it negligently supplied the furnace involved in his accident. (L.F. 90).

Plaintiff submitted his claim against Metal Mark on a theory that it negligently designed the furnace. (L.F. 91.)

### B. The Corporate Histories of IMCO Recycling and Metal Mark

A summary of the corporate histories of IMCO Recycling and Metal Mark, which is necessary for an understanding of the issues presented by this appeal, follows:

IMCO Recycling is a Delaware corporation with its headquarters at 5215 North O'Connor Boulevard in Irving, Texas. (Ex. H at 41; Ex. BB.) IMCO Recycling of Illinois, Inc. (IMCO of Illinois) is also a Delaware corporation with its principal place of business at 5215 North O'Connor Boulevard in Irving, Texas. (Ex. AA; A12.) Until March 31, 1998, IMCO of Illinois was IMCO Recycling's wholly owned subsidiary, at which time the two corporations merged. (Exs. B, C, V, and AA; A2-3.) After the merger, IMCO Recycling was the surviving corporation. (Exs. V and AA.)

Before October 1, 1995, Metal Mark owned Marnor and Pittsburgh as subsidiary corporations. (T. 181, 378; Ex. A; Ex. H at 3-4; and A1.) Metal Mark, in turn, was a wholly owned subsidiary corporation of Alumar, Inc. (Ex. A; Ex. H at 1.)

On October 1, 1995, Alumar merged with and into IMCO of Illinois. (Exs. H and AA; A12-13.) Through this merger, Metal Mark became IMCO of Illinois's wholly owned subsidiary. (Exs. B and H; A2.) In 1996, 1997, and 1998,

Metal Mark maintained its principal place of business or corporate headquarters at 5215 North O'Connor Boulevard in Irving, Texas. (Ex. X; A5.) Later, in 1998, after IMCO of Illinois merged into IMCO Recycling, Metal Mark changed its name to IMCO Recycling of Illinois, Inc. (Ex. W.)

On June 3, 1996, Marnor merged with Metal Mark, which was the surviving corporation. (Ex. Y; A8-10.) Pittsburgh, however, remained a wholly owned subsidiary of Metal Mark. (Ex. C; A3.)

Following Alumar's merger with IMCO of Illinois, Metal Mark entered into a management agreement with IMCO Management Partnership, L.P. (IMCO Management) on October 2, 1995. (Exhibit J.) Under the agreement, IMCO Management provided Metal Mark with payroll, accounting, and insurance services. (Exhibit J; T. 182.) However, IMCO Recycling did not interfere with the day-to-day operations of its subsidiary corporations. (T. 384.) These operations were conducted by the individual plant managers. (T. 384.)

Trial exhibits summarizing the corporate structures of IMCO Recycling and Metal Mark are contained in this brief's appendix.

### C. Plaintiff's Employer

On June 9, 1997, Plaintiff filed a workers' compensation claim for his accident. (Ex. DD.) He named Marnor as his employer. (Ex. DD.) An answer to Plaintiff's claim was filed in Marnor's name on June 16, 1997. (Ex. DD.) Later, during the trial of this case, an amended answer was filed. (Ex. DD.) This answer named Metal Mark as Plaintiff's employer. (Ex. DD.)

On June 9, 1997, Marnor was no longer in existence because of its merger with Metal Mark. (Exs. C and Y; A3, A8-10.) At the time of Plaintiff's accident and the filing of his workers' compensation claim, Metal Mark owned and operated the Marnor plant where Plaintiff worked. (Exs. C and Y; T. 271; A3, A8-10.)

Plaintiff testified that Metal Mark was his employer in 1996. (T. 304). Plaintiff further acknowledged that Metal Mark was listed as his employer on his W-2 forms for both 1996 and 1997. (T. 304-305; Exs. D and E.) Exhibits D and E confirm his testimony.

**D. The Furnace's Transfer to the Marnor Plant**

Paul DuFour is IMCO Recycling's executive vice president and chief financial officer, although IMCO Management may possibly be his actual employer. (T. 180.) Mr. DuFour testified "IMCO Recycling" made the decision to close the Pittsburgh plant at the time Metal Mark was acquired. (T. 183.) He explained IMCO Recycling had a larger facility in Sapulpa, Oklahoma, and that it was not economic to operate two plants that were close together. (T. 183.) IMCO Recycling is the direct owner and operator of the Sapulpa plant. (T. 384.)

Jonathan Markle also discussed the closure of Pittsburgh's plant. Mr. Markle was Metal Mark's president and chief executive officer from 1991 to 1995. (T. 270-271.) After "IMCO Recycling" acquired Metal Mark, he remained as president of the Metal Mark division until March 1998. (T. 270.)

Mr. Markle testified Pittsburgh's plant was closed because it was viewed as being a duplicate location because of the nearby IMCO plant in Sapulpa, Oklahoma. (T. 271-272.) Before its closure, Metal Mark owned Pittsburgh's plant. (T. 279.) Mr. Markle was unsure who made the decision to close the plant. (T. 272.) However, he believed "the management of IMCO" did so. (T. 272.)

After Pittsburgh's plant was closed, one of its furnaces was moved to the Marnor plant in Sikeston in late December 1995 and early January 1996. (T. 273; Ex. G.) This furnace was Pittsburgh's asset. (T. 273, 277.) The disassembly and shipment of the furnace was done at Mr. Markle's direction. (T. 277.)

Mr. Markle testified he made the decision to move the furnace "in coordination with Dallas." (T. 276.) When he made the decision, he was the manager of Metal Mark, "which was a wholly owned subsidiary of IMCO Recycling, Inc. in Dallas." (T. 276.) Mr. Markle testified he was accountable to "IMCO Recycling, Inc. in Dallas" for Metal Mark's performance; when he made major capital decisions; he "would typically talk to them yes or no;" and in this instance, he suggested "it would be appropriate to move that furnace." (T. 276.)

Jeffrey Mecom is an officer of IMCO Recycling and an employee of IMCO Management. (T. 376, 379-380.) He serves as in-house counsel and is responsible for keeping the corporate records for IMCO Recycling and its subsidiaries. (T. 376-377.)

Mr. Mecom testified the furnace that injured Plaintiff was Pittsburgh's asset, which had been transferred from the Pittsburgh facility to the Marnor

facility in Missouri. (T. 377.) Mr. Mecom testified "IMCO Recycling, Inc." never owned the furnace and never possessed it and that it was supplied to the Marnor facility by Pittsburgh. (T. 377-378.) His testimony is consistent with the furnace's bill of lading showing Pittsburgh as the shipper. (Ex. G.)

Mr. Mecom did not know the actual process from a management standpoint by which the furnace was moved. (T. 382.) However, he believed "in general" that Mr. Markle kept "people in like operating side [sic] of the business in Dallas informed of what he was doing." (T. 382.)

**E. Plaintiff's Furnace Accident**

The furnaces at the Marnor plant were each composed of large, rotating barrels with an opening at one end. (T. 101.) In these openings, material was placed inside. (T. 101.)

On the day of Plaintiff's accident, material had been put in the furnace and heated, and then more material was added. (T. 109.) Plaintiff then "raked" the furnace by using a long pole attached to a forklift to push the material to the back of the furnace. (T. 109.) Plaintiff backed the forklift away from the furnace before the furnace was rotated. (T. 110.) As soon as the furnace began rotating, the furnace emitted a flame and other material. (T. 111.) This material struck Plaintiff while he was on the forklift. (T. 112.) Plaintiff was severely burned in the accident. (T. 112-113.)

Duane Meeker, Plaintiff's expert forensic engineer, testified, when impurities are added to molten metal, they expand and can cause metal to be

ejected from the furnace. (T. 191.) Mr. Meeker testified this risk was well known in the aluminum industry. (T. 194.) Mr. Meeker said he believed Plaintiff's accident was caused by the addition of a moist material to molten metal. (T. 197.) He explained that when the moist material was enclosed by molten metal, the moist material rapidly expanded and caused the explosion. (T. 197.) Mr. Meeker further testified that cold materials may also explode when heated in a furnace. (T. 212.)

Mr. Meeker concluded the furnace was not in a safe condition because there was no guard in front of the furnace's opening. (T. 199.) He believed a guard would have prevented Plaintiff's injuries. (T. 200.) As the furnace had no guards, Mr. Meeker stated the furnace was defectively designed. (T. 200-201.)

At the conclusion of the trial, the jury returned a $4 million verdict in Plaintiff's favor, assessing sixty percent fault to IMCO Recycling and forty percent fault to Metal Mark. (L.F. 98.) This appeal follows.

## POINTS RELIED ON

I. The trial court erred in denying Metal Mark's motion to dismiss for lack of subject matter jurisdiction, because the trial court lacked subject matter jurisdiction over Metal Mark, in that exclusive jurisdiction over Plaintiff's claim against Metal Mark rested with the Missouri Division of Labor and Industrial Relations as Metal Mark was Plaintiff's employer at the time he was injured in the scope and course of his employment.

*Quick v. All Tel Missouri, Inc.*, 694 S.W.2d 757 (Mo.App. E.D. 1985)

*Anders v. A.D. Jacobsen, Inc.*, 972 S.W.2d 612 (Mo.App. W.D. 1998)

*State ex rel. Jones Construction Co.*, 875 S.W.2d 154 (Mo.App. E.D. 1994)

Section 287.120.2, R.S.Mo. 2000

Section 287.800, R.S.Mo. 2000

Section 351.440, R.S.Mo. 2000

Section 351.458, R.S.Mo. 2000

II. The trial court erred in denying IMCO Recycling, Inc.'s motion to dismiss for lack of personal jurisdiction, because the trial court lacked personal jurisdiction over IMCO Recycling, in that:

A. IMCO Recycling did not commit one of the predicate acts in Missouri's long-arm statute necessary to subject it to personal jurisdiction in Missouri; and

B. IMCO Recycling did not have sufficient minimum contacts with Missouri to satisfy the due process requirements of the Fourteenth

Amendment of the United States Constitution for the imposition of personal jurisdiction.

*State ex rel Wichita Falls General Hospital v. Adolph*, 728 S.W.2d 604 (Mo.App. E.D. 1987)

*Chromalloy v. Elyria*, 955 S.W.2d 1 (Mo. banc 1997)

*State ex rel. Sperandio v. Clymer*, 581 S.W.2d 377 (Mo. banc 1979)

Section 506.500, R.S.Mo. 2000

Rule 55.27(g), Missouri Rules of Civil Procedure

III. In the alternative and in the event the Court holds the trial court possessed personal jurisdiction over IMCO Recycling, which IMCO Recycling, denies, the trial court erred in denying IMCO Recycling's motion for judgment notwithstanding the verdict, because Plaintiff failed to make a submissible case against IMCO Recycling for the negligent supply of a dangerous instrumentality, in that Plaintiff did not prove that IMCO Recycling supplied the furnace to the Marnor facility or that IMCO Recycling knew or could have known the furnace contained no guards, shields, or doors.

*Trout v. General Security Services Corp.*, 8 S.W.3d 126 (Mo.App. S.D. 1999)

*Papastathis v. Beall*, 723 P.2d 97 (Ariz. App. 1986)

*Bloemker v. Detroit Diesel Corp.*, 720 N.E.2d 753 (Ind. App. 1999)

*Dooley v. Parker-Hannifin Corp.*, 817 F.Supp. 245 (D.R.I. 1993)

## ARGUMENT

I. The trial court erred in denying Metal Mark's motion to dismiss for lack of subject matter jurisdiction, because the trial court lacked subject matter jurisdiction over Metal Mark, in that exclusive jurisdiction over Plaintiff's claim against Metal Mark rested with the Missouri Division of Labor and Industrial Relations as Metal Mark was Plaintiff's employer at the time he was injured in the scope and course of his employment.

### A. Introduction

The trial court's judgment in Plaintiff's favor and against Metal Mark should be reversed because the trial court lacks subject matter jurisdiction. Under Section 287.120.2, R.S.Mo. 2000, the Missouri Labor and Industrial Relations Commission has exclusive jurisdiction over Plaintiff's work-related claim because Metal Mark, through its merger with Marnor Aluminum Processing, Inc., was Plaintiff's employer at the time he was injured in the scope and course of his employment.

### B. Standard of Review

On appeal, the Court's review of the trial court's assumption of subject matter jurisdiction over Metal Mark is governed by an abuse of discretion standard. *Maxon v. Leggett & Platt*, 9 S.W.3d 725, 729 (Mo.App. S.D. 2000). The burden to show that the trial court lacks jurisdiction is on Metal Mark. *Shaver v. First Union Realty Mgmt., Inc.*, 713 S.W.2d 297, 299 (Mo.App. S.D. 1986). However, Metal Mark's burden is not a difficult one. The quantum of proof is not

high. *Zahn v. Associated Dry Goods Corp.*, 655 S.W.2d 769, 772[6] (Mo.App. E.D. 1983). Unassailable proof is not required. *Zahn*, 655 S.W.2d at 772. Rather, an action should be dismissed whenever it "*appears*" the trial court lacks jurisdiction. *State ex rel. Jones Construction Co. v. Sanders*, 875 S.W.2d 154, 157 (Mo.App. E.D. 1994) (emphasis added); Rule 55.27(g)(3), Missouri Rules of Civil Procedure.

This standard accords with the purpose of the Workers' Compensation Law. Section 287.800, R.S.Mo. 2000, directs the Court to construe the Law liberally and with a view to the public welfare. *Vatterott v. Hammerts Iron Works, Inc.*, 968 S.W.2d 120, 121 (Mo. banc 1998). Where the question of jurisdiction is in question, any doubts should be decided in favor of jurisdiction in the Labor and Industrial Relations Commission. *Vatterott*, 968 S.W.2d at 121; *Bass v. National Super Markets, Inc.*, 911 S.W.2d 617, 619 (Mo. banc 1995).

### C. Section 287.120 mandates that the rights and remedies granted an employee against his employer under Chapter 287 are exclusive.

Once the employer, the employee, and the accident fall under Chapter 287, the case is heard by the Labor and Industrial Relations Commission, which has original and exclusive jurisdiction. *State ex rel. Jones Construction Co.*, 875 S.W.2d at 156. The Workers' Compensation Law is substitutional and supplants any and all common-law claims -- including strict product liability claims -- possessed by the employee against the employer. *Anders v. A.D. Jacobsen, Inc.*,

972 S.W.2d 612, 615 (Mo.App. W.D. 1998); *Baker v. Armco, Inc.*, 684 S.W.2d 81, 82 (Mo.App. W.D. 1984).

Here, the trial court lacks subject matter jurisdiction over Metal Mark because Plaintiff, Metal Mark, and the accident fall under Chapter 287. At the time of Plaintiff's accident, Metal Mark was Plaintiff's employer and Plaintiff was acting within the course and scope of his employment. (T. 304-305; Exs. D and E.)

**D. Metal Mark was Plaintiff's employer at the time of the furnace accident.**

The identity of an employer -- for purposes of the Workers' Compensation Law -- is determined at the time the employee's injury occurs, not at the time the allegedly wrongful act occurs. *Quick v. All Tel Missouri, Inc.*, 694 S.W.2d 757, 759 (Mo.App. E.D. 1985). In *Quick*, the plaintiff's original employer merged with another company before the plaintiff's injury. On appeal, the Missouri Court of Appeals held that the new company that was created by the merger, also known as the "surviving company," was the plaintiff's employer and, thus, received immunity from common-law liability under Section 287.120. *Id*.

Marnor was originally Plaintiff's employer. However, before Plaintiff's accident, Marnor merged with Metal Mark on June 3, 1996. (Exhibit Y; A8-10.) Through its merger with Marnor, Metal Mark, as the surviving corporation, became Plaintiff's employer as a matter of law on June 3, 1996. (Ex. Y; A8-10.) The holding in *Quick* so provides. So does Plaintiff's testimony. Plaintiff testified

that Metal Mark was his employer at the time of the accident. (T. 304-305; Exs. D and E.)

Therefore, the judgment against Metal Mark should be reversed. Plaintiff's action against Metal Mark should have been dismissed for want of subject matter jurisdiction. His work-related injury took place on January 12, 1997, over six months after Metal Mark's merger with Marnor.

### E. Plaintiff's anticipated arguments do not compel a contrary conclusion.

Metal Mark anticipates Plaintiff will argue the merger between Marnor and Metal Mark did not take place before his injury because Metal Mark only filed the merger papers with the Illinois Secretary of State -- and not the Missouri Secretary of State -- before his accident on January 12, 1997. Plaintiff's argument fails as a matter of law.

Section 351.440, R.S.Mo. 2000, provides that the effective date of a merger is the date upon which the Missouri Secretary of State issues a certificate of merger. However, Section 351.458, R.S.Mo. 2000, supplants Section 351.440 in cases such as this one. Section 351.458 provides in cases in which the surviving corporation is a foreign corporation, "the effective date of such merger shall be the date on which the same becomes effective in the state of domicile of such surviving corporation."

The domicile of Metal Mark, the merger's surviving corporation, is Illinois. (Exhibit Y; A9.) Therefore, under Section 351.458, the merger between Marnor

and Metal Mark became effective on June 3, 1996, as a matter of law. For, on June 3, 1996, the Illinois Secretary of State issued a certificate of merger. (Exhibit Y; A10.)

Moreover, there is no dispute between Missouri and Illinois over the effective date of the merger between Marnor and Metal Mark. Missouri agrees the merger took effect on June 3, 1996. The certificate of merger issued by the Missouri Secretary of State so declares. (Exhibit Y; A8.)

**F. Conclusion**

The trial court's judgment against Metal Mark should be vacated and Plaintiff's claims against Metal Mark should be dismissed for want of subject matter jurisdiction. Through its merger with Marnor, which took place before Plaintiff's injury, Metal Mark became Plaintiff's employer as a matter of law. Therefore, Plaintiff's exclusive remedy against Metal Mark for his injuries, which were sustained within the course and scope of his employment with Metal Mark, are under Chapter 287, the Missouri Workers' Compensation Law, an enactment that supplants all common-law claims Plaintiff might otherwise possess against Metal Mark, his employer.

II. The trial court erred in denying IMCO Recycling's motion to dismiss for lack of personal jurisdiction, because the trial court lacked personal jurisdiction over IMCO Recycling, in that:

A. IMCO Recycling did not commit one of the predicate acts in Missouri's long-arm statute necessary to subject it to personal jurisdiction in Missouri; and

B. IMCO Recycling did not have sufficient minimum contacts with Missouri to satisfy the due process requirements of the Fourteenth Amendment of the United States Constitution for the imposition of personal jurisdiction.

**1. Introduction and Standard of Review**

The trial court's judgment in Plaintiff's favor and against IMCO Recycling, Inc., a Delaware corporation with its principal place of business in Texas (L.F. 269, 276; Ex. H at 41; Ex. BB), should be reversed because the judgment is void for want of personal jurisdiction. IMCO Recycling did not commit one of the predicate acts in Missouri's long-arm statute to subject IMCO Recycling to personal jurisdiction in Missouri. Nor did IMCO Recycling have sufficient minimum contacts with Missouri to satisfy the due process requirements necessary for the trial court's exercise of personal jurisdiction.

IMCO Recycling's exclusive contact with Missouri for this case is its purported concurrence in the decision by Metal Mark -- IMCO of Illinois's wholly owned subsidiary -- to transfer a furnace from Metal Mark's Pittsburgh plant in

Kansas to Metal Mark's Marnor plant in Sikeston, Missouri. (T. 276, 279.) IMCO of Illinois was a wholly owned subsidiary of IMCO Recycling. (Exs. B, C, H, and AA; A2-3.)

On appeal, the Court reviews the trial court's ruling on personal jurisdiction *de novo*. *Stavrides v. Zerjav*, 848 S.W.2d 523, 527 (Mo.App. E.D. 1993). Whether a trial court has personal jurisdiction over a defendant is a question of law for the Court to decide. *Id*.

**2. The Standards for Personal Jurisdiction**

The due process clause of the Fourteenth Amendment to the United States Constitution prohibits a state from exercising personal jurisdiction over a non-resident defendant -- such as IMCO Recycling -- unless the defendant has "sufficient minimum contacts" with the state in which the cause of action arises. *State ex rel. Wichita Falls General Hospital v. Adolph*, 728 S.W.2d 604, 606 (Mo.App. E.D. 1987). For a Missouri court to exercise personal jurisdiction over a non-resident defendant, two elements must be satisfied. First, the lawsuit must arise out of one of the activities in Missouri's long-arm statute, Section 506.500, R.S.Mo. 2000. Second, the defendant must have sufficient minimum contacts with Missouri to satisfy the requirements of due process. *Chromalloy v. Elyria*, 955 S.W.2d 1, 4 (Mo. banc 1997). A defendant preserves its challenge to personal jurisdiction by raising its objection in a motion or in its answer. Rule 55.27(g)(1), Missouri Rules of Civil Procedure.

### 3. IMCO Recycling did not commit a tortious act in Missouri.

The trial court lacks personal jurisdiction over IMCO Recycling because the prerequisites for the exercise of personal jurisdiction are absent. IMCO Recycling did not commit a tortious act in Missouri.

The only evidence IMCO Recycling played some part in the incident giving rise to Plaintiff's injuries comes from the testimony of Jonathan Markle, the former president of Metal Mark. (T. 272.) Mr. Markle testified he made the decision to transfer the furnace from Pittsburgh's plant to Marnor's plant "in coordination with Dallas." (T. 275-276).

When Mr. Markle's testimony is viewed in the light most favorable to Plaintiff and all contrary inferences are ignored, "Dallas," as presumably found in the trial court, refers to IMCO Recycling. However, as observed by the Honorable Phillip R. Garrison in his dissenting opinion, "Dallas" could refer to IMCO of Illinois, Metal Mark's immediate parent company. (Dissenting Opinion at 2-3.) IMCO Recycling and IMCO of Illinois all have their offices at 5215 North O'Connor Boulevard in Irving, Texas. (Ex. H at 41; Ex AA; A12.) At trial, Plaintiff did not prove who "Dallas" was.

In any event, Mr. Markle's testimony is insufficient to subject IMCO Recycling to personal jurisdiction in Missouri. Consider the holding of the Supreme Court of Missouri in *State ex rel. Sperandio v. Clymer*, 581 S.W.2d 377 (Mo. banc 1979). The Court rejected a conspiracy claim as a basis for subjecting an out-of-state physician to personal jurisdiction in Missouri because he had been consulted by a

Missouri physician. The Court held the conspiracy allegations against the non-resident physician were insufficient to subject the non-resident physician to personal jurisdiction because the plaintiff had not shown that the non-resident physician had committed a tortious act within Missouri, the existence of minimum contacts with Missouri, or that the physician had availed himself to the benefit and protection of the laws of Missouri. *State ex rel. Sperandio*, 581 S.W.2d at 383-384.

The fact Plaintiff suffered harm in Missouri allegedly due to IMCO Recycling's purported concurrence in Metal Mark's decision to transfer the furnace to Missouri is of no import. As explained by the Supreme Court of Missouri in *State ex rel. William Ranni Associates, Inc. v. Hartenbach*, 742 S.W.2d 134, 138 (Mo. banc 1987), the fact someone in Missouri could suffer harm as a result of the out-of state defendant's activities does not subject the defendant to personal jurisdiction in Missouri, unless the defendant purposely avails itself of the benefits and protections of Missouri's laws. *State ex rel. William Ranni Associates, Inc.*, 742 S.W.2d at 138.

Here, no basis exists for subjecting IMCO Recycling to personal jurisdiction in Missouri under Missouri's long-arm statute. IMCO Recycling has not committed a tort in Missouri. Nor has IMCO Recycling purposely availed itself of the laws and protections of Missouri.

### 4. IMCO Recycling does not have sufficient contacts with Missouri that subject it to personal jurisdiction consistent with due process requirements.

The requirement of "minimum contacts" necessary to support personal jurisdiction may be met by a single act done or by a single act consummated within the forum state on a claim relating to that act or transaction. *State ex rel. Caine v. Richardson*, 600 S.W.2d 82, 84 (Mo.App. E.D. 1980). For example, a defendant's physical presence, as opposed to the transmission of data and information, in Missouri favors a finding of personal jurisdiction. *Marler v. Hiebart*, 943 S.W.2d 853, 857 (Mo.App. W.D. 1997).

Satisfaction of the due process protections against the assertion of personal jurisdiction over a non-resident, corporate defendant requires the existence of "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). "[I]t is essential in each case that there be some act by which the defendant personally avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

Due process requires that a defendant have purposeful minimum contacts with the forum state and "should reasonably anticipate being haled into court there," so as to avoid offending "traditional notions of fair play and substantial justice." *Hagen v. Rapid American Corp.*, 791 S.W.2d 452, 452 (Mo.App. E.D. 1990). The

"purposeful availment" requirement exists to prevent a defendant from being haled into a particular jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, or by the "unilateral" activity of another party or a third person. *Capitol Indemnity Corp. v. Citizens National Bank of Fort Scott, N.A.*, 8 S.W.3d 893, 902 (Mo.App. W.D. 2000).

In judging the defendant's contacts, courts focus on the relationship among the defendant, the forum, and the litigation. *Capitol Indemnity Corp.*, 8 S.W.3d at 902. The court considers five factors: (1) the nature and quality of the contacts with the forum state; (2) the quality of the contacts with the forum state; (3) the relationship of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties. *Id*. The first three factors are of the greatest importance, while the last two are secondary. *Id*.

When the record is viewed in the light most favorable to Plaintiff, IMCO Recycling had, at most, two contacts with Missouri. First, IMCO Recycling is the ultimate parent corporation of Metal Mark, Plaintiff's employer and the owner of the Marnor plant where Plaintiff's injury took place. (T. 271, 304-305; Exs. C, D, E, H, and Y.) Second, Jonathan Markle consulted with someone "in Dallas" before his decision to transfer the furnace from Pittsburgh's plant to Marnor's plant, both of which were owned by Metal Mark at the time. (T. 275-276.)

Neither contact is sufficient to satisfy the requirements of due process. None possesses the quality, quantity, or relationship to Plaintiff's action that would

otherwise justify the exercise of personal jurisdiction over IMCO Recycling in Missouri.

**a. IMCO Recycling's status as Metal Mark's ultimate corporate parent is an insufficient contact for personal jurisdiction.**

IMCO Recycling's status as Metal Mark's ultimate parent corporation is an insufficient basis for a Missouri court to assume personal jurisdiction. *Radaszewski v. Contrux*, 891 F.2d 672, 674 (8th Cir. 1989) (applying Missouri law). "Generally, two different corporations are treated as two different persons, even if one corporation is the sole shareholder of the other." *Hefner v. Dausman*, 996 S.W.2d 660, 664 (Mo.App. S.D. 1999). Therefore, the mere fact a subsidiary company does business within a state does not confer jurisdiction over its parent, even if the parent is the sole owner of the subsidiary. *Escude Cruz v. Ortho Pharmaceutical*, 619 F.2d 902, 905 (1st Cir. 1980). *See also Dickson v. Panalpina*, 179 F.3d 331, 338 (5th Cir. 1999) (related companies are presumed independent for purposes of personal jurisdiction); *State ex rel. Syntex Agri-Business v. Adolf*, 700 S.W.2d 886, 889 (Mo.App. E.D. 1985) (related corporations may be distinct for personal jurisdiction purposes).

An exception to the general rule exists where the plaintiff can pierce the corporate veil. *Hefner*, 996 S.W.2d at 664. Piercing the corporate veil may be permitted in cases in which the parent corporation has such dominion and control

over the subsidiary corporation that the subsidiary has no separate mind, will, or existence of its own, and is but an alter ego or agent of the parent. *Id*.

For the corporate veil to be pierced, the parent's control over the subsidiary corporation "must be actual, participatory, and total." *Hefner*, 996 S.W.2d at 665. The parent's dominion and control must be established by evidence and is never presumed. *Grease Monkey International, Inc. v. Godat*, 916 S.W.2d 257, 262 (Mo.App. E.D. 1995). The burden of presenting this evidence is on the party arguing that the corporate form should be disregarded. *Fairbanks v. Chambers*, 665 S.W.2d 33, 37 (Mo.App. W.D. 1984).

Here, there is no evidence that Metal Mark was IMCO Recycling's agent or alter ego. Plaintiff made no such assertion. Nor could he. Where a plaintiff claims a subsidiary corporation was the parent corporation's alter ego for personal jurisdiction purposes, the plaintiff cannot claim the subsidiary, and not the parent, was the plaintiff's employer for workers' compensation purposes. *Villar v. Crowley Maritime*, 780 F.Supp. 1467, 1475-1476 (S.D. Tex. 1992).

Moreover, the uncontroverted evidence established that IMCO Recycling never owned or operated the Marnor facility where Plaintiff worked. (T. 384.) The evidence also established that IMCO Recycling did not interfere with the day-to-day operations of its subsidiary corporations. (T. 384.)

At trial, Plaintiff only presented evidence that Metal Mark consulted "Dallas" when Metal Mark made the decision to transfer the furnace from the Pittsburgh plant to the Marnor plant. (T. 275-276.) This consultation is an

insufficient predicate upon which to subject IMCO Recycling to personal jurisdiction in Missouri.

Contrast this case with *Walls v. Allen Cab Co., Inc.*, 903 S.W.2d 937 (Mo.App. E.D. 1995), and *Swall v. Custom Automotive Service, Inc.*, 831 S.W.2d 237 (Mo.App. W.D. 1992). In *Swall*, the following evidence established the president and vice president of a corporation dominated and controlled the corporation for purposes of piercing the corporate veil: (1) the president and vice president made all decisions concerning operation of the corporation; (2) they controlled moneys paid out by the corporation; (3) they received whatever compensation they determined appropriate for their services; (4) they authorized disbursement of funds; (5) they determined which contracts the corporation executed; (6) they determined which creditors were paid; (7) they controlled the corporation's checking account; (8) they withdrew from the corporation's account amounts of money they deemed appropriate for themselves; and (9) much of the authority exercised by them was not routinely exercised by corporate officers generally without supervision. *Swall*, 831 S.W.2d at 240.

Similarly, in *Walls*, the corporate veil between a bank and a cab company was pierced by evidence: (1) corporations owned by bank owned the majority of the cab company's stock; (2) directors of the corporations were bank officers; and (3) the final decision-making authority for the cab company rested with bank employees. *Walls*, 903 S.W.2d at 942-943.

The facts here stand in contrast to those in *Walls* and *Swall*. There is no evidence, much less substantial evidence, that Metal Mark was IMCO Recycling's agent or alter ego. Plaintiff never so claimed. The mere fact IMCO Recycling is Metal Mark's ultimate corporate parent is an insufficient predicate upon which to subject IMCO Recycling to personal jurisdiction in Missouri.

**b. IMCO Recycling has no minimum contacts with Missouri.**

IMCO Recycling cannot be subject to personal jurisdiction in Missouri based upon the activities of its subsidiary, Metal Mark. Rather, for the due process safeguards guaranteed by the Fourteenth Amendment to be satisfied, personal jurisdiction over IMCO Recycling must be based on IMCO Recycling's *own* activities in Missouri.

IMCO Recycling's only possible contact with Missouri related to Plaintiff's claim comes from the testimony of Metal Mark's former president, Jonathan Markle. Mr. Markle testified he had consulted with someone "in Dallas" about his decision to move the furnace from the Pittsburgh plant to the Marnor plant in Missouri. (T. 275-276.) This single contact is insufficient to satisfy the due process requirements of the Fourteenth Amendment. A telephone call by a person *in* Missouri to a person *outside* Missouri is not sufficient to show the person *outside* Missouri purposely availed himself or herself of the laws and protections of Missouri. Rather, this limited type of contact is at best a "random and attenuated contact" that does not give rise to personal jurisdiction.

The fact Mr. Markle testified *he* decided to move the furnace "in coordination with Dallas" is of no import in determining whether personal jurisdiction exists. (T. 276.) *See, e.g*., *Mead v. Conn*, 845 S.W.2d 109 (Mo.App. W.D. 1993); *TSE Supply Co. v. Cumberland Natural Gas Co.*, 648 S.W.2d 169 (Mo.App. E.D. 1983). In *Mead*, the Court of Appeals held that a Missouri court could not exercise personal jurisdiction over a Kansas physician who regularly transmitted his patient's test results, including the result of an EKG performed on the plaintiff, to a Missouri physician and who consulted with the Missouri physician about the interpretation of those test results. The Court of Appeals explained the exercise of personal jurisdiction over a Kansas physician who transmitted test results to Missouri would offend traditional notions of fair play and substantial justice because the Kansas physician's transmittal of information to Missouri did not establish a reasonable quantity of contacts with Missouri. *Mead*, 845 S.W.2d at 113.

Similarly, in *TSE Supply Co*., the Court of Appeals held the placement of single telephone call into Missouri and the mailing of a single letter into Missouri were "insufficient contacts with the forum to satisfy due process in the assertion of [personal] jurisdiction" over a foreign defendant. *TSE*, 648 S.W.2d at 170.

Also on this point, consider again *Capital Indemnity Corp*., which affirmed the dismissal of an action against a non-resident bank for lack of personal jurisdiction because the bank had only one contact with Missouri. The Court of Appeals explained the bank's conduct in forwarding a letter to a city in Missouri

about payments due and payable to the city's surety was insufficient to subject the bank to personal jurisdiction in Missouri consistent with the requirements of due process. 8 S.W.3d at 902.

Consider also *Pohlman v. Bil-Jax Corp.*, 954 S.W.2d 371 (Mo.App. E.D. 1997), where a scaffolding manufacturer assigned Missouri as a territory to one of its sales representatives. The manufacturer let the sales representative decide for himself whether to sell scaffolds in Missouri. In a subsequent product liability case, the Court of Appeals held, absent evidence the manufacturer exercised control over the representative's sales activities in Missouri, that the plaintiff failed to establish the existence of sufficient minimum contacts to support the trial court's exercise of personal jurisdiction over the manufacturer. *Id*. at 373. The Court explained that sufficient minimum contacts did not result from the manufacturer's ability to foresee that one of its scaffolds might end up in Missouri or by the manufacturer's intent to sell or market in Missouri. *Id*. Rather, as held by the Court, personal jurisdiction is premised on the defendant's activities in Missouri and not upon its intentions about Missouri. *Id*.

Just as was the case with the bank in *Capitol Indemnity Corp.* and the manufacturer in *Pohlmann*, IMCO Recycling engaged in no activities in Missouri related to Plaintiff's accident. At best, when affording Plaintiff every favorable inference from Mr. Markle's testimony that he decided to move the furnace to Missouri "in coordination with Dallas" (T. 276), and ignoring contrary inferences concerning the identity of "Dallas," IMCO Recycling had knowledge that its

discussions with Metal Mark's president might affect property in Missouri, and nothing more.

IMCO Recycling's mere knowledge the furnace might be moved to Missouri does not satisfy constitutional due process guarantees. *See, e.g*., *Pohlmann*, 954 S.W.2d at 373. *See also Garrity v. A.J. Processors*, 850 S.W.2d 413 (Mo.App. S.D. 1993) (no personal jurisdiction over defendant because defendant's allegedly tortious acts were not committed in Missouri). IMCO Recycling's contact with Missouri and Plaintiff's cause of action was casual and attenuated. The evidence does not show that IMCO Recycling purposely availed itself of the laws and protections of Missouri or that its sole purported contact with Missouri is sufficient to satisfy constitutional due process.

**5. IMCO Recycling preserved its personal jurisdiction defense.**

IMCO Recycling anticipates Plaintiff will argue IMCO Recycling waived the right to challenge the trial court's exercise of personal jurisdiction because IMCO Recycling brought a cross-claim against Max Sweet. This argument should be rejected should Plaintiff make it.

IMCO Recycling filed a motion to dismiss for lack of personal jurisdiction. (L.F. 31.) IMCO Recycling also raised the defense of lack of personal jurisdiction in its answer. (L.F. 64.) Either one of these two pleadings preserved IMCO Recycling's personal jurisdiction defense. Rule 55.27(g)(1), Missouri Rules of Civil Procedure. Moreover, IMCO Recycling asserted the defense at trial and in

its post-trial motion. (T. 352; L.F. 138.) As explained by the Missouri Court of Appeals, "[i]f a defendant first challenges the court's jurisdiction, he may then enter and probe into the merits of the case without the necessity of making the time-honored 'special appearance' or reserving the jurisdictional point at each stage of the procedure. Having once hoisted the flag at the beginning of the journey a litigant over whose person a court lacks jurisdiction need not continuously wave the flag at every way station along the route." *Walker v. Gruner*, 875 S.W.2d 587, 589 (Mo.App. E.D. 1994).

**6. Conclusion**

The trial court's judgment in Plaintiff's favor should be reversed and Plaintiff's action against IMCO Recycling should be dismissed for want of personal jurisdiction. Absent at trial was evidence of the existence of any contacts sufficient to warrant the exercise of personal jurisdiction over IMCO Recycling. IMCO Recycling did not commit any act that could subject it to personal jurisdiction in Missouri under Missouri's long-arm statute. Moreover, there is no evidence that IMCO Recycling purposely availed itself of the protections and laws of Missouri so as to satisfy the constitutional requirements of due process.

III. In the alternative and in the event the Court holds the trial court possessed personal jurisdiction over IMCO Recycling, which IMCO Recycling denies, the trial court erred in denying IMCO Recycling's motion for judgment notwithstanding the verdict, because Plaintiff failed to make a submissible case against IMCO Recycling for the negligent supply of a dangerous instrumentality, in that Plaintiff did not prove that IMCO Recycling supplied the furnace to the Marnor facility or that IMCO Recycling knew or could have known the furnace contained no guards, shields, or doors.

### A. Introduction

The trial court's judgment in Plaintiff's favor and against IMCO Recycling should be reversed because Plaintiff failed to make a submissible case under Section 392 of the RESTATEMENT (SECOND) OF TORTS. IMCO Recycling cannot be the "supplier" of a furnace owned by one of its subsidiary corporations and over which IMCO Recycling never had possession or control. Plaintiff's claim fails as a matter of law because there is no substantial evidence:

- IMCO Recycling made the decision to transfer the furnace to the Marnor facility.
- IMCO Recycling is a "supplier" under Section 392.
- IMCO Recycling knew or could have known the furnace had no guards, shields, or doors.

### B. The Standard of Review

When a plaintiff fails to make a submissible case, the defendant is entitled to an entry of a judgment notwithstanding the verdict. *Stewart v. Goetz*, 945 S.W.2d 520, 528 (Mo.App. E.D. 1997). To make a submissible case, the plaintiff bears the burden of establishing by substantial evidence every element of the cause of action and every fact essential to liability. *Id*. The failure to establish any element or essential fact defeats the plaintiff's claim. *Id*.

"Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of facts can reasonably decide a case." *Stewart*, 945 S.W.2d at 528. The questions of whether the evidence is substantial and whether the inferences drawn are reasonable are matters of law. *Id*.

In determining whether the plaintiff made a submissible case, the Court views the evidence in the light most favorable to the plaintiff and gives the plaintiff the benefit of all reasonable and favorable inferences to be drawn from the evidence. *Stewart*, 945 S.W.2d at 528. But, the Court may not supply missing evidence or give the plaintiff the benefit of unreasonable, speculative, or forced inferences. *Id*. The evidence and inferences must establish every element and not leave any issue to speculation. *Id*.

### C. The Elements of Plaintiff's Section 392 Claim

Plaintiff submitted his case against IMCO Recycling on the theory IMCO Recycling negligently supplied a dangerous instrumentality for its business purposes. The claim's six elements follow: (1) The defendant supplied a

dangerous instrumentality for use; (2) the dangerous instrumentality had a defect or hazard, and was therefore dangerous when put to a reasonably expected use; (3) the dangerous instrumentality was put to a reasonably expected use; (4) the defendant knew, or in the exercise of reasonable care could have known, of the dangerous condition; (5) the defendant failed to exercise ordinary care to either make the condition reasonably safe or to adequately warn of it; and (6) the plaintiff sustained damage as a direct result of the defendant's failure to exercise ordinary care. *Trout v. General Security Services Corp.*, 8 S.W.3d 126, 131 (Mo. App. S.D. 1999); RESTATEMENT (SECOND) OF TORTS § 392 (1965); and MAI 25.10(B) [1995 Revision].

IMCO Recycling is entitled to judgment as a matter of law. Absent at trial was substantial evidence to support the first and fourth elements of Plaintiff's claim. Plaintiff's verdict directing instruction hypothesized, among other facts, that "Defendant IMCO Recycling, Inc., supplied the rotary furnace for use" and "Defendant IMCO Recycling, Inc., knew or in the exercise of ordinary care could have known [the rotary furnace contained no guards, shields, or doors]." (L.F. 90.) However, Plaintiff failed to produce substantial evidence to support these two assertions. Instead, Plaintiff relied on missing evidence and unreasonable, speculative, and forced inferences.

### D. IMCO Recycling did not make the decision to move the furnace to the Marnor facility.

The only evidence connecting IMCO Recycling to the events resulting in Plaintiff's injury comes from the testimony of Jonathan Markle, Metal Mark's former president. (T. 276.) Mr. Markle testified Pittsburgh owned the furnace. (T. 273.) Pittsburgh was Metal Mark's wholly owned subsidiary. (T. 271-272; Ex. C; A3.) Before Plaintiff's injury, Pittsburgh's plant was closed. (T. 271-272.) Thereafter, Mr. Markle directed the furnace's transfer from Pittsburgh's plant to Metal Mark's Marnor plant, where plaintiff worked. (T. 275-276.) Mr. Markle made the decision to transfer the furnace "in coordination with Dallas." (T. 276.)

When Mr. Markle's testimony is viewed in the light most favorable to Plaintiff and all contrary inferences are ignored, "Dallas," as presumably found in the trial court, refers to IMCO Recycling. However, as observed by the Honorable Phillip R. Garrison in his dissenting opinion, "Dallas" could refer to IMCO of Illinois, Metal Mark's immediate parent company. (Dissenting Opinion at 2-3.) IMCO Recycling and IMCO of Illinois have their offices at 5215 North O'Connor Boulevard in Irving, Texas. (Ex. H at 41; Ex. AA; A. 12.) So did Metal Mark in 1996, 1997, and 1998. (Ex. X; A5-6.) At trial, Plaintiff did not prove who "Dallas" was.

Moreover, regardless of the identity of "Dallas," Mr. Markle's testimony is insufficient to show that IMCO Recycling "supplied" the furnace to Metal Mark's Marnor facility. A holding that IMCO Recycling "supplied" the furnace requires

an inference from Mr. Markle's testimony that IMCO Recycling made the decision to transfer the furnace to Marnor. But this is not what Mr. Markle said.

Mr. Markle testified *he* made the decision to transfer the furnace "in coordination with Dallas." (T. 276.) There is no evidence showing what "coordination" meant. Mr. Markle was not asked and he did not explain what he meant by the word.

From Mr. Markle's testimony, several reasonable inferences may be drawn:

- He merely consulted with "Dallas."
- He made the decision and told "Dallas" about it later.
- "Dallas" consented to a decision he made as Metal Mark's president.
- He asked for and received authority from "Dallas" to move the furnace.

From Mr. Markle's testimony, it is possible to infer that IMCO Recycling may or may not have directed the transfer of the Pittsburgh furnace to the Marnor plant. However, it is just as likely, if not more likely, that IMCO Recycling's only involvement was to receive from Mr. Markle his decision to move the furnace or to consent or acquiesce to his decision that it be done.

These equally reasonable inferences from Mr. Markle's testimony demonstrate there is no substantial evidence IMCO Recycling made the decision to supply Pittsburgh's furnace to Metal Mark's Marnor plant. "[W]here evidence equally supporting two inconsistent and contradictory factual inferences as to ultimate and determinative facts is solely relied on to make a submissible case, there is a failure of proof as the case has not been removed from the tenuous status

of speculation, conjecture and surmise." *Hurlock v. Park Lane Med. Ctr., Inc*., 709 S.W.2d 872, 880 (Mo.App. W.D. 1985).

The fact Mr. Markle may have "talked" to IMCO Recycling about "major capital decisions" does not support a contrary conclusion. (T. 276.) Mr. Markle testified he merely "talked" to IMCO Recycling about such decisions. However, there is no indication from his testimony that IMCO Recycling made the decision to transfer Pittsburgh's furnace to the Marnor facility. Nor is there any evidence the decision to move the furnace fell in the category of a "major capital decision." Rather, Mr. Markle testified *he* made the decision to move the furnace "in coordination with Dallas." (T. 276.)

Similarly, the fact Mr. Markle suggested to IMCO Recycling that it would be appropriate to move the furnace does not make IMCO Recycling the furnace's supplier. (T. 276.) Jeffrey Mecom, IMCO Recycling's corporate counsel, explained that "in general [Mr. Markle] would keep people in like operating side [sic] of the business in Dallas informed of what he was doing." (T. 382.)

In conclusion, Mr. Markle's testimony is insufficient to show that IMCO Recycling made the decision to move the furnace. Absent speculation, conjecture, and surmise, it cannot be said that IMCO Recycling directed the transfer of the furnace to the Marnor facility in Sikeston. Mr. Markle testified *he* made the decision. (T. 276.) The fact he did so "in coordination with Dallas" does not call for a contrary conclusion. (T. 276.) His testimony is susceptible to several equally plausible conclusions, some of which would indicate that IMCO

Recycling directed the furnace's move, and some that it did not. These contradictory inferences defeat Plaintiff's claim as a matter of law.

### E. IMCO Recycling is not a "supplier."

Plaintiff's claim also fails because IMCO Recycling is not subject to liability as a "supplier" under Section 392. Mr. Markle's testimony that *he* made the decision to move the furnace "in coordination with Dallas" is insufficient to cast IMCO Recycling as a "supplier" that is subject to liability for supplying a dangerous instrumentality to another. (T. 276.)

Comment a to Section 392 incorporates by reference the comments to Sections 388-390 of the Restatement. Comment c to Section 388 defines those persons who qualify as "suppliers" under Section 392. Under comment c to Section 388, a "supplier" is "any person who for any purpose or in any manner gives possession of a chattel for another's use, or who permits another to use or occupy it while it is in his own possession or control." RESTATEMENT (SECOND) OF TORTS § 388 comment c (1965). Sellers, lessors, donors, lenders, and bailors qualify as "suppliers." *Id*.

Actual ownership of the chattel is immaterial. RESTATEMENT (SECOND) OF TORTS § 392 comment c (1965). However, for a person to be liable as a "supplier" under Section 392, the person must have had "possession or control" of the chattel for the purpose of using it in connection with his business. *Id*.

The comments to Sections 388 and 392 demonstrate the key element that must be shown for the imposition of liability is proof the alleged "supplier"

exercised sufficient control over the chattel that the supplier gave possession of the chattel to another. However, an alleged supplier's mere consultation with the person in actual possession and control of the chattel or giving one's permission to give the chattel to another, absent evidence of possession and control, does not make the person a "supplier" under Section 392. Case law from other jurisdictions so confirms.

Consider *Papastathis v. Beall*, 723 P.2d 97 (Ariz. App. 1986), a case that addressed whether Southland Corporation was a supplier of Coca-Cola display racks in a Seven-Eleven store for purposes of Section 388 of the Restatement. A soda can fell from the rack and struck the decedent in the head. The plaintiffs argued Southland was a "supplier" of the racks because Southland had inspected, suggested, and endorsed the racks to its franchisees. The racks themselves were owned by Coca-Cola, which physically delivered the racks to the franchisees. In holding that Southland was not a "supplier" under the Restatement, the court explained as follows:

> Since Coca-Cola at all times owned the racks and Coca-Cola gave possession to the franchisee, Southland cannot possibly fit within the above-mentioned categories. Southland's connection to these racks was in inspecting, suggesting and endorsing these racks to its franchisees. In effect, Southland was the facilitator of this arrangement. Southland did,

> however, voluntarily undertake to request that franchisees install the racks in their stores.

*Papastathis*, 723 P.2d at 99-100.

Consider also *United States v. Page*, 350 F.2d 28 (10th Cir. 1965). In *Page*, the court refused to hold the United States liable as a supplier of a defective chattel where the government owned the mold in question, but never possessed it or exercised control over it. Referring to Section 392, the court explained "[t]he rule there stated is limited to circumstances where the chattel is 'supplied' by the person sought to be held liable, and was at one time in its control and possession." *Page*, 350 F.2d at 33. The court noted "[t]he typical situation would be where such person made or assembled them, then furnished or 'supplied' them to another."

Finally, consider *Bloemker v. Detroit Diesel Corp.*, 720 N.E.2d 753 (Ind. App. 1999), where the court held the owner of a pattern had no duty to warn the pattern's user or to protect the user from harm because the owner was not a "supplier" under either Section 388 or Section 392 of the Restatement. Although the owner had the power to decide where the pattern would be sent, the court refused to classify the pattern's owner as a "supplier" because the owner never had physical possession or control over the pattern. *Bloemker*, 720 N.E.2d at 759-761. *See also White v. Chrysler Corp.*, 364 N.W.2d 619, 623 (Mich. 1984) (owner not liable for supplying defective die set where the set was never in its possession or control).

These authorities demonstrate that the mere consultation by a subsidiary corporation with a parent corporation on the transfer of the subsidiary corporation's chattel from one place to another is insufficient to impose liability under the Restatement. The party subject to liability must have had possession or control over the chattel and then supplied the chattel to another. Under Section 392, absent possession or control, there can be no liability.

The result in this case should be the same as those reached by the courts in *Papastathis*, *Page*, and *Bloemker*. Here, the conclusion IMCO Recycling is not a "supplier" is even more compelling. Unlike the defendants in *Page* and *Bloemker*, IMCO Recycling did not own the furnace. (T. 273, 377, 378.) Like the defendants in *Papastathis*, *Page*, and *Bloemker*, IMCO Recycling never had possession or control over it. (T. 378.)

Moreover, unlike the defendant in *Papastathis*, there is no evidence IMCO Recycling inspected the furnace or suggested that it be moved. Rather, Mr. Markle testified *he* was the one who suggested it should be moved, and that it was *he* who made the decision to move it, albeit "in coordination with Dallas." (T. 276.)

Here, IMCO Recycling's relationship to the furnace is remote and attenuated. Pittsburgh owned the furnace. (T. 273, 377.) Pittsburgh was a wholly owned subsidiary of Metal Mark, which was a wholly owned subsidiary of IMCO of Illinois, which was a wholly owned subsidiary of IMCO Recycling. (Exs. B, C,

V, H, and AA; T. 279.) IMCO Recycling was three corporations removed from Pittsburgh, the furnace's owner.

The fact Metal Mark owned Pittsburgh and the fact IMCO Recycling was Metal Mark's ultimate corporate parent do not make IMCO Recycling a "supplier" under Section 392. Separate corporations are treated as separate entities, even if one corporation's stock is wholly owned by the other. *Hefner v. Dausmann*, 996 S.W.2d 660, 664 (Mo.App. S.D. 1999). An exception exists when the corporate veil is pierced. *Id*. The corporate veil will be pierced only when one corporation has such dominion and control over the other that the subsidiary is only an alter ego or an agent for the parent. *Id*. *See also Grease Monkey International, Inc., v. Godat*, 916 S.W.2d 257, 262 (Mo.App. E.D. 1995).

Here, there is no evidence of dominion and control by IMCO Recycling over Metal Mark. Plaintiff made no attempt to show that Metal Mark or Pittsburgh was IMCO Recycling's alter ego or agent. Rather, the only evidence was to the contrary. IMCO Recycling did not directly interfere with the day-to-day operations of its subsidiary corporations. (T. 384.)

Mr. Markle, Metal Mark's former president, testified *he* made the decision to move the furnace to the Marnor plant "in coordination with Dallas." (T. 276.) A subsidiary company's decision made "in coordination" with its corporate parent does not rise to the necessary level of dominion and control that authorizes a court to pierce the corporate veil. IMCO Recycling never had possession or control over the furnace. (T. 378.) Under Section 392, IMCO Recycling is not the

furnace's supplier, and cannot be liable for Plaintiff's injuries as a matter of law. To hold otherwise, the Court would have to give Plaintiff the benefit of missing evidence or unreasonable or speculative inferences.

### F. IMCO Recycling did not know the furnace had no guards, shields, or doors.

Plaintiff's claim against IMCO Recycling fails as a matter of law for one more reason. There is no evidence IMCO Recycling knew or could have known the furnace was in an allegedly dangerous condition because it contained no guards, shields, or doors.

There is no evidence IMCO Recycling had possession of the furnace. (T. 378.) There is no evidence the furnace had ever been seen by one of its employees. And there is no evidence Metal Mark or Pittsburgh had ever informed IMCO Recycling of the furnace's condition. Moreover, as Metal Mark and Pittsburgh are separate corporations that were not shown to be IMCO Recycling's agents or alter egos, their knowledge of the furnace may not be imputed to IMCO Recycling. Lacking either possession or control, IMCO Recycling was in no position to inspect the furnace, to know what its condition was, or to prevent Plaintiff's injury.

On this point, consider *Dooley v. Parker-Hannifin Corp.*, 817 F.Supp. 245 (D. R.I. 1993), where the court refused to impose liability on the owner of a defective die under a "supply" theory. The die was, and had always been, in the possession of another party. The court explained, because the owner never had

possession over the die, the owner was in no position to learn of or guard against any defects and, therefore, was in no position to prevent future harm to those using the die. *Dooley*, 817 F.Supp. at 247.

This case warrants the same result. IMCO Recycling was never in possession of the furnace. (T. 378.) Therefore, it was in no position to know of its condition, to warn of any dangers, or to remedy any defects. The judgment in Plaintiff's favor should be reversed as a matter of law.

### G. Conclusion

Plaintiff failed to make a submissible case that IMCO Recycling was negligent for supplying a dangerous instrumentality for the supplier's business purposes. There is no substantial evidence IMCO Recycling made the decision to move the furnace to the Marnor plant. Absent possession and control, IMCO Recycling does not qualify as a "supplier" under Section 392 of the Restatement. And, absent possession and control, there is no substantial evidence IMCO Recycling knew or could have known of the furnace's condition such that IMCO Recycling could have warned of or remedied its condition. Therefore, the judgment entered in Plaintiff's favor and against IMCO Recycling should be reversed as a matter of law.

## CONCLUSION

Defendant Metal Mark, Inc., requests the Court to reverse and vacate the trial court's judgment against it. The trial court lacked subject matter jurisdiction over Plaintiff's claim.

Defendant IMCO Recycling, Inc., requests the Court to reverse and vacate the trial court's judgment against it. The trial court lacked personal jurisdiction over IMCO Recycling because it did not commit a tortious act in Missouri.

In the alternative and in the event the Court concludes the trial court possessed personal jurisdiction over IMCO Recycling, which IMCO Recycling denies, the trial court's judgment against it should be reversed as a matter of law. Plaintiff failed to make a submissible case for the negligent supply of a dangerous instrumentality.

Respectfully submitted,

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## AFFIDAVIT OF SERVICE

The undersigned certifies that on the 20th day of November, 2001, a copy of appellants' substitute brief and a disk containing same were sent prepaid by Federal Express, to: J. Michael Ponder, Attorney for Respondent, 715 North Clark, P.O. Box 1180, Cape Girardeau, Missouri 63702-1180.

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T. Michael Ward No. 32816

Subscribed to and sworn before me this 20th day of November, 2001.

_____

Notary Public

My Commission Expires:

## CERTIFICATE OF COMPLIANCE

The undersigned certifies that appellant's substitute brief complies with the limitations in Special Rule No. 1 and Rule 84.06 of the Missouri Rules of Civil Procedure, contains 11,406 words, and that the computer disk filed with appellant's brief under Rule 84.06 has been scanned for viruses and is virus-free.

T. Michael Ward #32816

# APPENDIX